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Supreme Court, U.S.
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No. 00-189

In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

In *United States v. Alaska*, 521 U.S. 1 (1997), this Court held, in the context of a statehood act, that congressional ratification of an executive order reservation known to contain submerged lands may imply an affirmative intent to defeat state title to such submerged lands. The question presented here is whether a defeat of state title to submerged lands is implied when Congress, in a pre-statehood act, authorizes cession negotiations with an Indian tribe occupying an executive order reservation for the purchase of lands "not agricultural and valuable chiefly for minerals and timber," with the purpose of releasing submerged lands from the reservation.

PARTIES

The parties to the proceedings before the Court of Appeals for the Ninth Circuit were the State of Idaho, as the appellant and cross-respondent, the United States of America, as respondent, and the Coeur d'Alene Tribe, as respondent and cross-appellant.

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OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals (Pet. App. 1-30) is reported at 210 F.3d 1067 (9th Cir. 2000). The decision of the district court (Pet. App. 31-86) is reported at 95 F.Supp.2d 1094 (D. Idaho 1998).

JURISDICTIONAL STATEMENT

The court of appeals entered its judgment on May 2, 2000. The petition for a writ of certiorari was filed with this Court on July 25, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Indian Department Appropriations Act of May 15, 1886, 24 Stat. 29, provides in relevant part:

> To enable the Secretary of the Interior to negotiate with . . . the Coeur d'Alene Indians for the cession of their lands outside the limits of the present Coeur d'Alene reservation to the United States, fifteen thousand dollars, or so much thereof as may be necessary, to be immediately available; but no agreement made shall take effect until ratified by Congress.

The Indian Department Appropriations Act of March 2, 1889, provides in relevant part:

> That the Secretary of the Interior be, and he is hereby, authorized and directed to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of

> Indians, which purchase shall not be complete until ratified by Congress and for the purpose of such negotiation, the sum of two thousand dollars, or so much thereof as may be necessary, is hereby appropriated; the action of the Secretary of the Interior hereunder to be reported to Congress at the earliest practicable time.

Act of March 2, 1889, 25 Stat. 980, 1002.

The relevant portions of the Indian Department Appropriations Act of March 3, 1891, 26 Stat. 989, 1027, which ratified two cession agreements with the Coeur d'Alene Tribe, are set out in the Joint Appendix at 376-88. The Act of May 30, 1888, 25 Stat. 160, which granted a railroad right-of-way across the Coeur d'Alene Indian Reservation, is set out in the Joint Appendix at 137-40.

STATEMENT

At issue in this case are the beds and banks, or submerged lands, of those portions of Coeur d'Alene Lake and its tributary, the St. Joe River, that lie within the exterior boundaries of the Coeur d'Alene Indian Reservation. As this Court has previously remarked, Coeur d'Alene Lake is one of the nation's "most beautiful lakes." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 264 (1997). Although a portion of the Lake lies within the exterior boundaries of the Reservation, the land surrounding the Lake is owned predominately by non-Indians, as is most land within the Reservation.[1] Of the

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[1] By the Act of June 21, 1906, 34 Stat. 335, the Coeur d'Alene Reservation was allotted, and the surplus lands sold to non-Indians.

Reservation's 5,802 residents, only 749 are Native Americans. *Statistical Record of Native North Americans*, 1036 (M. Reddy. ed. 1993).

The State of Idaho has always had a special relationship to the Lake. In 1890, when Congress was debating Idaho's admission to the Union, one of the questions Congress addressed was whether the Idaho Territory had "the requisite population and resources to entitle [it] to statehood." H. R. Rep. No. 4053, 50th Cong., 2d Sess. 1 (1889). During these congressional debates, Coeur d'Alene Lake and its tributaries were frequently mentioned as important resources justifying Idaho's statehood.[2]

After statehood, early Idaho laws focused on the use of Coeur d'Alene Lake and its tributaries as commercial corridors for the transport of lumber. In 1903, the Idaho Legislature designated "Coeur d'Alene Lake and all of the streams tributary to and emptying into the same" as a lumber district. 1903 Idaho Sess. Laws 89.[3]

In later years, the State began addressing the need to preserve the Lake for public use. In 1927, the Idaho

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[2] *See* Argument of F.T. Dubois, in H. R. Rep. No. 4053, 50th Cong., 2d Sess. 56 (1889) ("lakes whose waters are as clear as crystal are plentifully scattered throughout the Territory . . . [t]he largest of these are Coeur d'Alene and Pend Oreille . . . Lake Coeur d'Alene is about 30 miles long and 4 miles wide, on which a daily line of steamers runs"); Remarks of Mr. Dorsey, 21 Cong. Rec. 2929 (noting that Idaho's waterways included the Spokane River, the Coeur d'Alene River, and the St. Joe River); Remarks of Mr. Dubois, *id.* at 2938 (noting that Coeur d'Alene Lake was an "important lake" of Idaho).

[3] Lumber districts were limited to certain designated waterways, referred to later in the same act as "waters of this State." 1903 Idaho Sess. Laws 89, 93.

Legislature declared submerged lands under Coeur d'Alene Lake "to be devoted to a public use in connection with the preservation of said [lake] in [its] present condition as a health resort and recreation place for the inhabitants of the state. . . . " Idaho Code § 67-4305 (Supp. 2000). The State also appropriated the waters of Coeur d'Alene Lake "in trust for the people of the state of Idaho," in order to preserve the water "for scenic beauty, health, recreation, transportation and commercial purposes. . . . " Idaho Code § 67-4304 (1995). Recreational opportunities were also preserved through the establishment of two state parks along the shores of Coeur d'Alene Lake and the St. Joe River. Idaho Code §§ 67-4202, 4212 (1989 & Supp. 2000). Both parks are within the exterior boundaries of the Coeur d'Alene Reservation.

Idaho also acted to protect the public's rights to the Lake and its tributaries. In 1931, the Idaho Legislature created a commission to "study and investigate ways and means of eliminating from the Coeur d'Alene River and Coeur d'Alene Lake, so far as practicable, all industrial wastes which pollute or tend to pollute the same. . . . " Idaho Code §§ 70-201, 204 (1999). Idaho prohibited dredge mining on "[t]he St. Joe River, including tributaries, from its origin to its confluence with Coeur d'Alene lake. . . . " Idaho Code § 47-1323 (1997). Idaho regulated encroachments upon Coeur d'Alene Lake to protect "property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality. . . . " Idaho Code § 58-1301 (1994).

State courts confirmed state title to the submerged lands of the Lake, including those portions within the boundaries of the Coeur d'Alene Indian Reservation. *West v. Smith*, 511 P.2d 1326, 1329-30 (Idaho 1973). The

Idaho courts have also confirmed that the primary uses of the Lake are public in nature. *See Shephard v. Coeur d'Alene Lumber Co.*, 101 P. 591, 592 (Idaho 1909) (holding Coeur d'Alene Lake "is a public highway"); *Burrus v. Edward Rutledge Timber Co.*, 202 P. 1067, 1068 (Idaho 1921), quoting *Northern Pac. Ry. Co. v. Hirzel*, 161 P. 854 (Idaho 1916) (holding that State holds bed of Coeur d'Alene Lake "for the use and benefit of the whole people"); *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club*, 671 P.2d 1085, 1088 (Idaho 1983) (applying public trust doctrine to bed of Coeur d'Alene Lake).[4]

For reasons unknown to the State, the federal government waited over 100 years before challenging Idaho's assumption of sovereignty over the submerged lands of Coeur d'Alene Lake and its navigable tributaries. It was not until 1994 that the government brought an action to assert ownership of submerged lands within the current boundaries of the Coeur d'Alene Reservation, excluding

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[4] Early Idaho court decisions created some confusion over proprietary rights to the submerged lands of the Lake and other navigable waters within Idaho. The Idaho Supreme Court mistakenly ruled that Idaho had adopted the English common law principle limiting sovereign title to those rivers or streams affected by the tide, with the beds of nontidal streams owned in fee by the riparian owner. *Johnson v. Johnson*, 95 P. 499, 502-03 (Idaho 1908). The Idaho Supreme Court later overruled its earlier decision, *Callahan v. Price*, 146 P. 732, 735 (Idaho 1915), and even repudiated it as "clearly a legislative act and not judicial." *Northern Pac. Ry. Co. v. Hirzel*, 161 P. 854, 859 (Idaho 1916). Thereafter, the Idaho courts have consistently recognized and confirmed state title to all submerged lands within the State, including Coeur d'Alene Lake. *E.g., Bowman v. McGoldrick Lumber Co.*, 219 P. 1063, 1065 (Idaho 1923); *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1088 (Idaho 1983).

submerged lands within Heyburn State Park, which lies within the Reservation boundaries.[5]

The government's action was filed in the Federal District Court for the District of Idaho, and the Coeur d'Alene Tribe intervened. In its ruling for the government and the Tribe, the district court made extensive factual findings in this case, which are not in dispute. As that court found, before the arrival of European settlers, the Coeur d'Alene Tribe occupied millions of acres in northern Idaho and northeastern Washington, centered on Coeur d'Alene Lake, the Coeur d'Alene River, the St. Joe River, and the Spokane River. Pet. App. 43. The Tribe's villages were located around the Lake and the rivers, which provided fish, game, and plants necessary to the Tribe's subsistence. Pet. App. 43-45.

In the 1840s, the Coeur d'Alenes, with the help of Jesuit missionaries, began to cultivate small garden plots. Pet. App. 46. When non-Indian settlers began to arrive in northern Idaho, concerns arose over potential conflicts between the Tribe's rights of occupancy and the land claims of the settlers. In response, President Johnson, in 1867, established a small reservation for the Tribe in the Hangman Valley, which lies some miles south of Coeur d'Alene Lake. Pet. App. 50. Only a small sliver of the

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[5] The federal government's action against the State followed on the heels of an unsuccessful action brought by the Coeur d'Alene Tribe. In 1991 the Tribe brought a quiet title action against the State of Idaho in federal district court, claiming ownership of submerged lands within both the current and former boundaries of the Coeur d'Alene Reservation. The Tribe's claims against the State were dismissed as a violation of the State's sovereign immunity. The dismissal was ultimately upheld by this Court in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

Lake lay within the boundaries established by President Johnson. *Id.*

The Tribe was apparently unaware of the 1867 Reservation; in 1871 they sent a petition to the Commissioner of Indian Affairs requesting that the farmlands in the Hangman Valley be set aside for their use. *Id.* In 1872, they sent a second petition, requesting the addition of the valleys along the St. Joe and Coeur d'Alene Rivers. Pet. App. 50-51. In explaining their needs, the Tribe wrote:

> [W]e are not as yet quite up to living on farming: with the work of God we took labor too, we began tilling the ground and we like it: though perhaps slowly we are continually progressing; but our unaided industry is not as yet up to the white man's. We think it hard to leave at once old habits to embrace new ones: for a while yet we need have some hunting and fishing.

Pet. App. 51; App. 27.[6]

In 1873, the Commissioner of Indian Affairs directed a three member commission to visit non-treaty tribes within Idaho and induce them to settle upon designated reservations. Pet. App. 54. The commissioners met with

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[6] Other correspondence from this time frame offered conflicting assessments of the Tribe's needs. Several reports emphasized the Tribe's commitment to farming, while other accounts noted a continued reliance on fishing. Pet. App. 52. The trial court concluded that the estimates of tribal reliance on farming were not necessarily based on personal knowledge, and were inflated by cultural and personal bias, and gave greater weight to the accounts depicting the Tribe as reliant on fishing. Pet. App. 52-53. One letter emphasized by the trial court was from surveyor David P. Thompson, who suggested enlarging the reservation to include fisheries on Coeur d'Alene Lake. Pet. App. 52; App. 30-31.

representatives of the Coeur d'Alene Tribe, and, in four days of negotiations, agreed to establish a reservation that included the valleys of the St. Joe and Coeur d'Alene Rivers, and the lands surrounding all but the extreme northern portion of Coeur d'Alene Lake. Pet. App. 55-56; App. 32-37. The agreement provided that it was not binding until ratified by Congress. Pet. App. 56.

One member of the commission, Idaho Territorial Governor Thomas Bennett, explained in a letter to an Idaho newspaper that the Tribe had demanded an extension of their reservation to include fishing and mill privileges on the Spokane River. Pet. App. 56-57; App. 38-41. The official report to the Commissioner of Indian Affairs, however, written by commission member John Monteith, made no mention of such demands, but explained that the Reservation boundaries were drawn to include Indian farms and to exclude lands claimed by white settlers. Pet. App. 56. The boundary along the Spokane River was drawn to avoid the cost of building a steam mill for the Tribe by making use of readily available water power. *Id.*

Three months after the signing of the agreement, President Ulysses S. Grant, on November 8, 1873, set apart a reservation for the Tribe, incorporating the boundaries described in the agreement. Pet. App. 57. The executive order was the result of a request from the Commissioner of Indian Affairs, who informed the Secretary of Interior that the order was needed to protect the agreed-upon lands "from trespass by white persons pending the action of Congress upon said agreement." *Id.*

Although the Commissioner of Indian Affairs had requested the executive order as a temporary measure pending ratification, Congress never ratified the agreement. The lack of congressional action resulted in the

executive order remaining in place through the next decade. This state of affairs was not satisfactory to the Tribe, and on March 23, 1885, they submitted a petition to the federal government requesting new negotiations, so that the Tribe would be "compensated for such portion of their lands not now reserved to them; [and] that their present reserve may be confirmed to them." Pet. App. 68, quoting H. R. Rep. No. 1109, 51st Cong., 1st Sess. 42 (1890).

The next year, Congress authorized negotiations with the Tribe for the cession of their lands outside the limits of the 1873 Reservation, and provided that any agreement reached would not take effect until ratified by Congress. Act of May 15, 1886, 24 Stat. 29, 44; App. 50. The authorized negotiations occurred in 1887, resulting in a proposed agreement that provided that "the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians." App. 379. The agreement also provided that it would "not be binding on either party until ratified by Congress." App. 382.

Around this same time, however, concerns arose regarding the Department of Interior's policies restricting the use of Coeur d'Alene Lake by non-Indians. Around 1880, steamboats had begun using the Lake to transport people and goods between the city of Coeur d'Alene, which lay outside the Reservation, and a landing on the Coeur d'Alene River, which lay within the Reservation. Pet. App. 69. From the landing, goods were transported overland to mining camps in the upper reaches of the Coeur d'Alene River. The steamboat operators transported liquor to the mines, and sold liquor to passengers while traveling over the Lake. *Id.*; App. 52-58. When this liquor trade was discovered in 1886, the Department of

Interior moved quickly to quash the transportation of liquor across the Lake, citing statutes prohibiting the introduction of liquor into "Indian country." Pet. App. 69. Around this same time, government agents began ejecting non-Indians who were fishing and camping along the Lake and its tributaries. Pet. App. 70.[7]

Concerns over the restrictions on non-Indian use of the Lake prompted Congress to delay ratification of the 1887 agreement, in favor of investigating the situation. In 1888, the Senate passed the following resolution:

> Whereas it is alleged that the present area of the Coeur D'Alene Indian Reservation, in the Territory of Idaho, embraces 480,000 acres of land; that there are, according to the statistics in the Indian Bureau, only about 476 Indians in the tribe now occupying such reservation, or more than 1,000 acres to each man, woman, and child; that Lake Coeur D'Alene, all the navigable waters of Coeur D'Alene River, and about 20 miles of the navigable part of Saint Joseph River, and part of Saint Mary's, a navigable tributary of the Saint Joseph, are embraced within this reservation, except a shore-line of about 3 1/2 miles at the north end of the lake, it being alleged that this lake and its rivers tributary constitute the most important highways of commerce in the Territory of Idaho, and are in fact the only navigable waters, except Snake River, now used for steam-boat navigation in the Territory; that all boats now entering such waters are

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[7] According to the report of a government inspector in 1886, the steamboats would stop at several landings within the Reservation for the purpose of "putting on and taking off . . . fishing and excursionist parties, with their supplies." App. 53.

subject to the laws governing the Indian country and all persons going on such lake or waters within the reservation lines are trespassers; and

Whereas it is further alleged that the Indians now on such reservation are located in the extreme southwest corner of the same around De Smedt Mission, near the town of Farmington, in Washington Territory, where the land is good for agriculture; and it being further alleged that all that part of such reservation lying between Lake Coeur D'Alene and Coeur D'Alene River and that part between the Coeur D'Alene River and Saint Joseph River is a territory rich in the precious metals and at the same time being of no real use or benefit to the Indians: Therefore,

Resolved, That the Secretary of the Interior be, and he is hereby, directed to inform the Senate as to the extent of the present area and boundaries of the Coeur D'Alene Indian Reservation in the Territory of Idaho; whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur D'Alene, and of Coeur d'Alene and St. Joseph Rivers; about what proportion of said reservation is agricultural, grazing and mineral land respectively; also the number of Indians occupying such reservation; also on what portion of such reservation the Indians now thereon are located; also whether, in the opinion of the Secretary, it is advisable to throw any portion of such reservation open to occupation and settlement under the mineral laws of the United States, and, if so, precisely what portion; and also whether it is advisable to release any of the navigable waters aforesaid from the limits of such reservation.

S. Misc. Doc. No. 36, 50th Cong., 1st Sess. (1888); App. 116-17.

Several weeks later, the Secretary of Interior responded by enclosing a report prepared by the Commissioner of Indian Affairs. The Commissioner's report concluded that "the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation which runs 'in a direct line' from the Coeur d'Alene Mission to the head of the Spokane River." S. Ex. Doc. No. 76, 50th Cong., 1st Sess. 3 (1888); App. 123. The Commissioner then turned to the question of "whether it is desirable to release any of the navigable waters mentioned in the resolution from the limits of said reservation." App. 126. The Commissioner began by stating: "In approaching this question [of release of navigable waters], I deem it proper to refer briefly to the character and condition of the Indians occupying the reservation and the situation of affairs as existing amongst them." *Id.* He noted that members of the Tribe "cultivate the soil extensively, live in comfortable houses, dress like the whites, wear short hair, and in all other respects live and do as white people do. . . . They own large bands of cattle and horses and an abundance of hogs and poultry." App. 127.

The Commissioner concluded that "[t]here are few Indians in the entire country, if we except the five civilized tribes, who are as far advanced. . . . " App. 126. The Commissioner also noted that members of the Tribe did not reside by the Lake, stating his belief that "all, or nearly all" of the tribal members lived on farmlands in the Hangman's Creek area "lying south of the Lake Coeur d'Alene and St. Joseph River." *Id.* After reciting the above

facts relating to the Tribe's needs, the Commissioner concluded that the Tribe retained its original Indian title to lands within the boundaries of the Reservation:

> [M]y own opinion is that the reservation might be materially diminished without detriment to the Indians, and that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom, which would be of very great benefit to the public; but this should be done, if done at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any land so taken.
>
> Just what portion of the reservation and navigable waters should be segregated from the reservation, I am unable to say. That, I think, should be determined by negotiations with the Indians.
>
> . . . .
>
> In conclusion I will state that in my opinion these Indians have all the original Indian rights in the soil they occupy. They claimed the country long before the lines of the reservation were defined by the executive order of 1873, and the present reservation embraces only a portion of the lands to which they laid claim.
>
> . . . .
>
> I think that when the present agreement [i.e., the 1887 agreement] shall have been ratified it will be an easy matter to negotiate with them for the cession of such portions of their reservation as they do not need, including all or a portion of the navigable waters, upon fair and very reasonable terms.

App. 129-32.

Congress rejected the Commissioner of Indian Affairs' recommendation to ratify the 1887 agreement.

Instead, Congress inserted the following language in the Indian Department Appropriations Act of March 2, 1889:

> That the Secretary of the Interior be, and he is hereby, authorized and directed to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress. . . .

Act of March 2, 1889, 25 Stat. 980, 1002; App. 144.

The directive to seek diminishment of the Reservation was prompted by the desire to obtain a release of at least some of the navigable waters. Pet. App. 22, n.14. The specific directions to the Secretary of Interior, however, omitted any mention of submerged lands. Act of March 2, 1889, 25 Stat. at 1002; App. 144.

Significantly, the 1889 Act was the last action that Congress took with regard to the Coeur d'Alene Reservation during the territorial period. In the summer of 1889, a group of prominent Idaho politicians met in Boise, Idaho, to draft a constitution for submission to Congress, in the hope of gaining statehood for Idaho. Their action was unusual, since Congress had not passed enabling legislation authorizing the formation of a state constitution.[8] In the absence of enabling legislation, the drafters

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[8] In the Act of February 22, 1889, Congress enabled North Dakota, South Dakota, Montana and Washington to form constitutions and state governments. 25 Stat. 676. The Act required the state constitutions to contain ordinances

looked to other enabling acts for guidance, and included standard language disclaiming title to public lands and lands owned or held by Indian tribes. Idaho Const., Art 21, § 19; App. 370-72.[9]

Despite the lack of enabling legislation, Congress approved the Idaho Constitution on July 3, 1890, and admitted Idaho into the Union as the 43rd State. Act of July 3, 1890, 26 Stat. 215. By this time, the negotiations with the Coeur d'Alene Tribe had been completed, and the results submitted to Congress for approval. The Tribe agreed to cede the northern portion of the Reservation. App. 384. The boundaries of the diminished Reservation bisected the Lake, with the southern third of the Lake remaining within the boundaries of the Reservation, while the northern two-thirds of the Lake, along with the surrounding uplands, were excluded from the Reservation. *Id.*

The 1889 agreement and the 1887 agreement were transmitted to Congress for ratification on December 18, 1889. H. R. Rep. No. 2988, 51st Cong., 1st Sess. 26 (1890); App. 373-75. The agreements were bundled as a package for consideration, partly because the Tribe had insisted on a provision stating that the 1889 agreement would not be binding on either party until ratification of the 1887 agreement. Pet. App. 8; App. 385.

Although the Senate passed a bill ratifying the 1887 and 1889 agreements on June 7, 1890, 21 Cong. Rec.

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disclaiming title to "all lands . . . owned or held by any Indian or Indian tribes." *Id.* at 677.

[9] Although the district court cited this provision as supporting its decision, Pet. App. 81-82, the court of appeals, in reaching its conclusions, expressly disclaimed any reliance on this provision. Pet. App. 24.

5769-70, App. 359-67, the House did not hold a vote on the bill that year, Pet. App. 8, and the agreements were not ratified until passage of the Indian Department's 1891 annual appropriation bill on March 3, 1891, eight months after Idaho's admission to the Union. 26 Stat. at 1027; App. 376-88.

The exterior boundaries of the Coeur d'Alene Reservation have remained the same since 1891, with one exception. In 1893, Congress authorized negotiations to purchase the townsite of Harrison, populated by non-Indians but located within the Reservation. Act of March 3, 1893, 27 Stat. 612, 616. Harrison stood on the shores of Coeur d'Alene Lake, immediately south of the mouth of the Coeur d'Alene River. The final description of the ceded lands, as negotiated with the Tribe, encompassed a one-mile rectangular strip of land that included a corner of Coeur d'Alene Lake, since the boundary of the cession descended one mile due south of the mouth of the Coeur d'Alene River, then proceeded east. Pet. App. 84-85; App. 392.

As previously discussed, the State exercised sovereignty over Coeur d'Alene Lake throughout the 20th century. It was not until 1994 that the United States sought to assert ownership of the submerged lands underlying the southern end of Coeur d'Alene Lake and the lower reaches of the St. Joe River. In its initial complaint, filed in the Federal District Court for the District of Idaho, the United States invoked federal court jurisdiction under 28 U.S.C. §§ 1331, 1345, and 2202. The Coeur d'Alene Tribe intervened, invoking federal court jurisdiction under 28 U.S.C. §§ 1331, 1345, 1346, 1362, and 1367. The State of Idaho counterclaimed, asserting sovereign title to the submerged lands put at issue by the United States. Pet. App. 32.

Following a two week trial, the federal district court, based on the historic facts set out above, concluded that the President, in setting aside the 1873 Reservation, had clearly intended to include submerged lands within the Reservation. Pet. App. 66. The court then turned to the issue of congressional ratification. The court concluded that by "authorizing the federal government to negotiate with the Tribe for a release of the submerged lands, Congress acknowledged that the Executive Order of 1873 had effectively conveyed ownership of those lands to the Coeur d'Alenes." Pet. App. 78. The court decreed that the Tribe, and the United States as trustee, were "entitled to the exclusive use, occupancy and right to the quiet enjoyment of the bed and banks of all the navigable waters within the current boundaries of the Coeur d'Alene Indian Reservation," excluding submerged lands within Heyburn State Park. App. 8.

The State appealed, and the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision.[10] Pet. App. 1-30. The court of appeals applied the two-pronged test from *United States v. Alaska*, 521 U.S. 1 (1997), to determine, first, whether the executive branch intended to include the submerged lands within the Reservation, and second, whether Congress affirmatively defeated state title to the submerged lands. Because the State conceded, for purposes of appeal, that the executive branch had intended, or by 1888 had interpreted, the 1873 Executive Order Reservation to include submerged lands,

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[10] The Tribe also filed a cross-appeal relating to the district court's refusal, on Eleventh Amendment grounds, to hear the Tribe's claims to submerged lands within Heyburn State Park, which were excluded from the United States' complaint. The court of appeals affirmed the district court. Pet. App. 27-30.

the court focused on the second prong of the *Alaska* test. Pet. App. 13.

The court of appeals acknowledged that the issue under the second prong of the test is "whether the congressional action at issue showed an affirmative intent to defeat state title, that is, whether the 'intention was definitely declared or otherwise made very plain.' " Pet. App. 12. The court of appeals, however, did not identify specific statutory language plainly declaring an affirmative intent to defeat state sovereignty to submerged lands. Nor did it identify any statute conveying submerged lands to the Tribe. Rather, it concluded that "the affirmative course of action on which Congress embarked in 1889 – open-ended negotiations to purchase whatever non-agricultural land, particularly submerged lands, the Tribe was willing to cede – presupposes that beneficial ownership of all land within the 1873 reservation, including submerged lands, *had already passed to the Tribe.*" Pet. App. 23 (emphasis added).

The court of appeals also purported to adopt this Court's admonition in *Alaska* that "the purpose of a conveyance or reservation is a critical factor in determining federal intent." 521 U.S. at 39. The court of appeals, however, explicitly declined to determine the purpose of the Coeur d'Alene Reservation as understood by Congress. Pet. App. 18-19. Rather, it held that it was necessary to examine purpose only as it related to the government's goals at the time the executive branch reserved the submerged lands. *Id.*

The court of appeals issued its decision on May 2, 2000. The State of Idaho filed a petition for a writ of certiorari with this Court on July 25, 2000. The petition was granted on December 11, 2000.

SUMMARY OF ARGUMENT

It is a rare and extraordinary thing for a sovereign government to abrogate the public's ownership of lands underlying navigable waters. Submerged lands are tied in a unique way to sovereignty, precisely because their natural and primary uses are public in nature. *Shively v. Bowlby*, 152 U.S. 1, 11 (1894). Only sovereign ownership assures that submerged lands will be maintained for the benefit of the whole people. If such lands are to be removed from common public use, it must be done with deliberation, and only after full consideration of the consequences. An intent to defeat sovereign title to submerged lands must also be plainly stated, because such an important decision would not be left for inference from ambiguous language. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 416 (1842).

For these reasons, the Court has carefully limited the circumstances under which it will infer an intent to sever submerged lands from sovereignty. While Congress, with its possession of national and municipal sovereignty over territories, may have the authority to sever submerged lands from sovereignty, and prevent their passage to future States, it has done so only in "the most unusual circumstances." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197 (1987). Within Indian reservations, an intent to defeat state sovereign title to submerged lands has been found only where Congress conveyed the lands in fee to the occupant tribe, and promised the tribe the lands would never be included within any future state. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 625 (1970). Where Congress has granted tribes rights other than full fee title, including rights of occupancy or exclusive use,

the Court has not inferred an intent to defeat state sovereign title to submerged lands within Indian reservations. *United States v. Holt State Bank*, 270 U.S. 49, 58-59 (1926); *Montana v. United States*, 450 U.S. 544, 554 (1981).

Within other types of federal reservations, an intent to defeat state title to submerged lands has been found only where Congress made the determination that state ownership would thwart the purposes for which the reservation had been established, and expressly prevented the state from assuming sovereignty and ownership over the submerged lands. *See generally United States v. Alaska*, 521 U.S. 1 (1997). Notably, in both *Choctaw Nation* and *Alaska*, the statutes in question addressed explicitly how the assumption of statehood would affect both sovereignty and title within the federal reservations at issue.

In the case of the Coeur d'Alene Indian Reservation, Congress never addressed the question of whether the future State of Idaho would be denied sovereign title to submerged lands within the Reservation. Prior to statehood, there were two congressional actions relating to submerged lands within the Reservation. The first was a Senate inquiry into allegations that steamboats on Coeur d'Alene Lake were "subject to the laws governing the Indian country and [that] all persons going on such lake or waters within the reservation lines are trespassers." App. 116-17. After being informed by the Department of Interior that it interpreted the Coeur d'Alene Indian Reservation to embrace the submerged lands of Coeur d'Alene Lake, Congress ordered negotiations to diminish the Reservation, through the purchase of lands from the Coeur d'Alene Tribe. In ordering the negotiations, however, Congress did not convey the submerged lands to the Tribe; it did not affirm the Reservation boundaries that

embraced the submerged lands; it did not direct that the public be denied access to the submerged lands or the overlying waters; and it did not address whether the submerged lands would later pass to the State as an incident of its sovereignty. Rather, Congress repudiated the Reservation as it then existed, directed its diminishment, and drafted its description of the lands to be purchased so as to avoid any implication that it was recognizing tribal title to the submerged lands. Act of March 2, 1889, 25 Stat. 980, 1002 (the "1889 Act").

In short, Congress did not "purport to defeat the entitlement of future States to any land reserved," and made "no mention of the States' entitlement to the beds of navigable rivers and lakes upon entry into statehood." *Utah Div. of State Lands*, 482 U.S. at 208. Further, neither the 1889 Act, nor its legislative history, suggest that Congress concluded that the future assumption of state sovereign title to submerged lands would thwart the purposes of the diminished Coeur d'Alene Indian Reservation. To the contrary, the language of the 1889 Act strongly implies that the primary purpose of the diminished Reservation was to provide lands to meet the agricultural needs of the Coeur d'Alene Tribe, and the legislative history described the Tribe's members as successful farmers. Thus, exclusive tribal control of submerged lands, and exclusion of the public uses associated with state sovereign title, were not necessary to fulfill the purposes of the diminished Reservation.

ARGUMENT

Submerged lands, are, by their nature, "incapable of ordinary and private occupation, cultivation, and improvement; and their natural and primary uses are

public in their nature. . . . " *Shively v. Bowlby*, 152 U.S. 1, 11 (1894). In ancient England, submerged lands were held by the King "for the benefit of the whole people." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196 (1987). Following the issuance of the Magna Carta, submerged lands became so identified with sovereignty that it was doubted whether "the king or any particular subject can gain a propriety exclusive of the common liberty." *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 412 (1842). If anything, American law ties submerged lands even more firmly to sovereignty. American law rejected the sovereign's rights of private property in submerged lands, *jus privatum*, that was recognized in England apart from the public's right to submerged lands, or *jus publicum*. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 286 (1997). These "developments in American law are a natural outgrowth of the perceived public character of submerged lands, a perception which underlies and informs the principle that these lands are tied in a unique way to sovereignty." *Id.*

Because submerged lands are so identified with sovereignty and public use, issues involving their ownership cannot be analogized to property transactions. "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself." *United States v. Oregon*, 295 U.S. 1, 14 (1935). Ownership can be vested in someone other than the rightful sovereign only after affirmative steps are taken to sever the lands "from the prerogative powers of government." *Martin*, 41 U.S. (16 Pet.) at 410.

The Constitution of the United States parcels sovereignty between the States and the federal government, and so this Court, in addressing title to submerged lands, was "called upon to draw the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments. . . . " *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 220 (1845). It soon became established law that within the original thirteen states, sovereign title to submerged lands was vested in the states. *Shively*, 152 U.S. at 16. Because subsequently admitted States enter the Union on an equal footing with the original thirteen states, they too are vested with title and control to submerged lands. *Utah Div. of State Lands*, 482 U.S. at 197. Each state's ownership and control of submerged lands is "an inseparable attribute of the equal sovereignty guaranteed to it upon admission [to the Union]." *United States v. Louisiana*, 363 U.S. 1, 16 (1960).

Before gaining admission, however, most western States were originally territories under the plenary control of the federal government. When the United States acquired new territories, "they took upon themselves the trust to hold the municipal eminent domain for the new states, to invest them with it, to the same extent, in all respects, that it was held by the [original states]." *Pollard*, 44 U.S. at 222-23. This trust extends to submerged lands. *See Shively*, 152 U.S. at 49 (submerged lands are held "in trust" for future states); *Montana v. United States*, 450 U.S. 544, 551 (1981) ("the Federal Government holds [submerged] lands in trust for future States"). While this trust is derived from ancient principles defining the very nature of sovereignty, the Constitution does not prohibit the United States from breaching the trust. The United States "have the entire dominion and sovereignty,

national and municipal, Federal and state, over all the territories, so long as they remain in a territorial condition." *Shively*, 152 U.S. at 48. The possession of both national and municipal sovereignty over a territory vests Congress with the authority to sever submerged lands from sovereignty, and prevent them from passing to future States formed out of the territory. *Id.*

While Congress can abrogate its responsibility to hold submerged lands in trust for future States, it has done so "only in the most unusual circumstances." *Utah Div. of State Lands*, 482 U.S. at 197. Firm congressional policy has been that submerged lands "shall not be granted away during the period of territorial government . . . unless in case of some international duty or public exigency." *Shively*, 152 U.S. at 50. This policy has consistently informed this Court's interpretation of congressional actions alleged to defeat state title to submerged lands: "[D]isposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).

Further, Congress' authority to defeat state title to submerged lands is strictly limited to the period during which Congress exercises municipal sovereignty over a territory. Upon a state's admission, "the title of the United States to lands underlying navigable waters within the State passes to it, as incident to the transfer to the State of local sovereignty. . . . " *United States v. Oregon*, 295 U.S. at 14. Once vested, state title to submerged lands is absolute and cannot be defeated. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

This Court's most recent cases have emphasized that defeats of state title to submerged lands are to be found only in exceptional circumstances. The court of appeals examined what it called this Court's "trilogy of decisions" in *United States v. Alaska*, 521 U.S. 1 (1997), *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987), and *Montana v. United States*, 450 U.S. 544 (1981). It is more revealing, however, to expand the analysis to include *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), wherein the Court found a defeat of state title. Together, the four decisions identify the factors that have led to a defeat of state title to submerged lands, and the factors, or lack thereof, that have led to the opposite conclusion.

In *Choctaw Nation*, the Court held that the United States had conveyed the bed of the Arkansas River to the Choctaw Nation. The factors the Court identified in its decision included the fact that the tribe was granted a fee simple patent to its lands. *Id.* at 625. The patent made an express reference to the "main channel of the Arkansas river" as a boundary. *Id.* at 630. Most importantly, the treaty pledged that the Nation would enjoy the "jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation . . . and that no part of the land granted to them shall ever be embraced in any Territory or State." *Id.* at 625, quoting Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333-34.

In later submerged lands decisions, the Court described the decision in *Choctaw Nation* as a "singular exception," and traced the outcome in large part to "the Government's promise that the reserved lands would never become part of any State," and the fact that the

Nation was promised "freedom from state jurisdiction." *Montana*, 450 U.S. at 555 n.5. The Court later stated that "indispensable to the holding [in *Choctaw Nation*] was a promise to the Indian Tribe that no part of the reservation would become part of a State." *Utah Div. of State Lands*, 482 U.S. at 198.

The next submerged lands case taken up by the Court was *Montana*, wherein the Crow Tribe claimed ownership of the beds and banks of the Big Horn River. There, as was the case in *Choctaw Nation*, the boundaries of the reservation were described by reference to the mid-channel of a navigable river.[11] The Crow Tribe, however, was not expressly promised that its lands would never be embraced within a future state. Rather, it was promised that its reservation was set apart "for the absolute and undisturbed use and occupation" of the Tribe. *Montana*, 450 U.S. at 548. Distinguishing *Choctaw Nation*, this Court held that:

> The treaty in no way expressly referred to the riverbed, *Packer v. Bird*, 137 U.S., at 672, nor was an intention to convey the riverbed expressed in "clear and especial words," *Martin v. Waddell*, 16 Pet., at 411, or "definitely declared or otherwise made very plain," *United States v. Holt State Bank*, 270 U.S., at 55. Rather, as in *Holt*, "[t]he

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[11] Article 2 of the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, described the boundary of the Crow Reservation as running up the 107th meridian "to the mid-channel of the Yellowstone River; thence up said mid-channel to the point where it crosses the said southern boundary of Montana. . . . " 2 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 1008 (1904). This portion of the Yellowstone River has been found to be navigable. *Edwards v. Sēverin*, 785 P.2d 1022, 1023-24 (Mont. 1990).

> effect of what was done was to reserve in a general way for the continued occupation of the Indians of what remained of their aboriginal territory." *Id.*, at 58.

450 U.S. at 554. The Court also found that "the situation of the Crow Indians at the time of the treaties presented no 'public exigency' that would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States," because "at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life." *Id.* at 556.

Six years after *Montana*, the Court again addressed the issue of title to submerged lands within a federal reservation in *Utah Div. of State Lands*. The situation addressed in *Utah Div. of State Lands* was unique, since it involved a reservation set aside for the specific purpose of preserving a navigable lake as a potential reservoir site. 482 U.S. at 199. Further, no third party was involved, so the only issue was whether the reservation of submerged lands would defeat state title. To answer the question, the Court began by noting that when the federal government reserves submerged lands, it "may not also intend to defeat a future State's title to the land" because the "land remains in federal control, and therefore may still be held for the ultimate benefit of future States." *Id.* at 202. Thus, the Court held, "we would not infer an intent to defeat a State's equal footing entitlement from the mere act of reservation itself." *Id.*[12] Rather,

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[12] Notably, in support of the proposition that an intent to allow the State obtain title to submerged lands within a federal reservation "would not be unusual," this Court cited decisions addressing submerged lands within Indian reservations, namely, *Montana* and *Holt State Bank*. 482 U.S. at 202.

the Court formulated a two prong test to address alleged defeats of state title arising from reservations of submerged lands. The Court held that "the United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation; the United States would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land." *Id.*

While the Court went on to hold, under the first prong, that there was no intent to include the submerged lands within the reservation in question, it also applied the second prong, holding that "Congress did not clearly express an intention to defeat Utah's claim to the lakebed under the equal footing doctrine upon entry into statehood." *Id.* at 208. In support of its holding, the Court identified three factors. First, the Act in question did not "purport to defeat the entitlement of future States to any land reserved," but merely reserved land from sale, entry, settlement or occupation. *Id.* Second, the Act made "no mention of the States' entitlement to the beds of navigable rivers and lakes upon entry into statehood." *Id.* Third, the transfer of the lakebed to the State would not defeat the purpose of the reservation, which was to develop a reservoir or water reclamation project at the lake. *Id.*

In this Court's most recent submerged lands decision, *United States v. Alaska*, the Court turned once again to the question of state title to submerged lands within a federal reservation. This time, however, the submerged lands in question had originally been reserved or set aside by the executive branch, not Congress. The Court employed the two prong test used in *Utah Div. of State Lands*, requiring a clear intent to include submerged lands

within the federal reservation, and an affirmative expression of intent to defeat the future state's title to such land. *Alaska*, 521 U.S. at 41. For the two reservations in question, the Court concluded that the first prong of the test was met, since the executive branch had clearly intended to include submerged lands within the reservations. *Id.* at 39-40, 55. The decisive question presented to the Court was whether Congress had taken additional actions that affirmatively defeated state title to submerged lands within the two areas reserved or set aside by the executive branch.

The first reservation addressed in *Alaska* was a national petroleum reserve. After finding that the executive branch had intended to include submerged lands within the reserve, the Court turned to the question of whether Congress intended to defeat state title to the submerged lands. The Court found such intent in § 11(b) of the Alaska Statehood Act. *Alaska*, 521 U.S. at 44. Section 11(b) provided that the United States would have the "power of exclusive legislation . . . as provided by [the Enclave Clause of the Constitution, Art. I, § 8, cl. 17] over such tracts or parcels of land as, immediately prior to the admission of said State, are owned by the United States and held for military . . . purposes, including naval petroleum reserve numbered 4 [the National Petroleum Reserve]." *Alaska*, 521 U.S. at 41. The Court concluded that Section 11(b), "which noted that the United States owned the Reserve and which included a statement of exclusive legislative jurisdiction under the Enclave Clause, reflected Congress' intent to ratify the inclusion of submerged lands within the Reserve and to defeat the State's title to those lands." *Id.* at 46.

In interpreting Section 11(b), the Court also relied heavily upon the purpose of the Reserve, which was to secure ownership of valuable oil deposits. *Id.* at 40. The Court noted that ownership of submerged lands was "necessary to prevent the Reserve's petroleum resources from being drained from beneath submerged lands." *Id.* at 42. In light of this fact, the Court concluded:

> [D]efeating state title to submerged lands was necessary to achieve the United States' objective – securing a supply of oil and gas that would necessarily exist beneath uplands and submerged lands. The transfer of submerged lands at statehood – and the loss of ownership rights to the oil deposits beneath those lands – would have thwarted that purpose.

Id. at 42-43.[13]

The second set of submerged lands addressed in *Alaska* was within the boundaries of an area withdrawn and set apart as a wildlife refuge, pursuant to an application submitted to the Secretary of Interior by the Bureau of Sport Fisheries and Wildlife. *Id.* at 46.[14] After finding that the withdrawal was intended to include submerged lands that served as wildlife habitat, the Court addressed whether Congress had affirmatively defeated state title to the submerged lands. The Court found such intent in § 6(e) of the Alaska Statehood Act. Section 6(e) addressed the circumstances under which Alaska would assume

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[13] The Court had earlier examined purpose as it related to the executive intent to include the submerged lands within the reservation. 521 U.S. at 39-40.

[14] At the time of statehood, the application was still pending. Department of Interior regulations in force at that time set such lands apart pending final approval of the application. 521 U.S. at 57-58.

sovereignty over fish and wildlife management. It provided that the federal government would retain "administration and management of the fish and wildlife resources of Alaska" until the Secretary of Interior certified to Congress "that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest." Pub. L. 85-508, 72 Stat. 339, 340-41. The Act also provided that:

> All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska . . . shall be transferred and conveyed to the State of Alaska by the appropriate federal agency; Provided . . . That such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife. . . .

Id. at 340-41.

Based on this strong language, the Court inferred an intent to defeat state title to submerged lands. It held that "Section 6(e) of the Alaska Statehood Act expressly prevented land that has been 'set apart as [a] refug[e]' from passing to Alaska." 521 U.S. at 61. It further concluded that "[i]n § 6(e) of the Statehood Act, Congress clearly contemplated continued federal ownership of certain submerged lands . . . so long as those submerged lands were among those 'withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife.' " *Id.* at 57. The only real issue was whether the refuge in question included submerged lands. Here, the Court turned to the purpose of the Reservation. It held that "waters within the boundaries of the Range were an

essential part of the habitats of the species the Range was designed to protect, and [the] retention of lands underlying those waters was critical to the Government's goal of preserving these aquatic habitats." *Id.* at 52. Because "[t]he 1957 application to create the wildlife refuge clearly encompassed submerged lands," *id.* at 61, the Court concluded that "the operative provision of the Alaska Statehood Act, § 6(e), reflects a very clear intent to defeat state title." 521 U.S. at 57.

The common thread running through the cases where this Court has found a defeat of state title to submerged lands is an unmistakable expression of congressional intent that the lands in question would not be subject to state sovereignty. In *Choctaw*, the Tribe was expressly promised at the time of treaty-making that no part of the reservation would become part of a state. Twice, this Court has emphasized this promise was indispensable to the holding in *Choctaw*. *Utah Div. of State Lands*, 482 U.S. at 198, *Montana*, 450 U.S. at 555 n.5.

In *Alaska*, Congress asserted Enclave Clause jurisdiction over the petroleum reserve, establishing that it was not just reserving proprietary rights to itself, but was denying the assumption of state sovereignty over lands within the reserve. *Alaska*, 521 U.S. at 46. For the wildlife refuge, Congress expressly prevented all lands within the refuge from passing to the State upon its admission. Importantly, the provision was made in the context of § 6(e) of the Alaska Statehood Act, which addressed the general assumption of state sovereignty over fish and game resources and the lands and property related to the assumption of such sovereignty.

In short, a defeat of state title to submerged lands within federal reservations has been found only where it

was clear, from the language and context of the statute in question, that Congress contemplated the effects of its action on the assumption of state sovereignty over submerged lands. Where the statute in question simply conveyed or reserved property rights, rather than allocating rights of sovereignty, no defeat of state title to submerged lands has been found. This principle is not new; in fact, it was applied in one of this Court's earliest submerged lands decisions, *Martin v. Waddell's Lessee*. There, the Court, describing the history of the State of New Jersey, found that during the colonial period, all sovereign and proprietary rights had been conveyed from King Charles II to the Duke of York, and then to the Proprietors of East New Jersey. 41 U.S. (16 Pet.) at 407. In 1702, the Proprietors of East New Jersey surrendered all rights of government and sovereignty to Queen Anne, explicitly retaining all rights of private property. *Id.* at 407, 415-16. The Court held that the surrender of sovereignty carried with it title to submerged lands, despite the express retention of all property rights. *Id.* at 416. The Court stated:

> [I]f the great right of dominion and ownership in the rivers, bays and arms of the sea, and the soils under them, were to have been severed from the sovereignty, and withheld from the crown; if the right of common fishery for the common people . . . was intended to be withdrawn, the design to make this important change in this particular territory would have been clearly indicated by appropriate terms; and would not have been left for inference from ambiguous language.

41 U.S. (16 Pet.) at 416.

By the same token, in order to find that the federal government has defeated state title to submerged lands within a federal Indian reservation, the government must

do more than retain property rights for itself or the occupant tribe. Congress must affirmatively intend to sever the submerged lands from future state sovereignty and dedicate the lands to federal or tribal uses which would be thwarted if the lands were subject to state sovereignty. An intent to defeat state title must also be definitely declared or otherwise made plain: because of the importance of submerged lands to sovereignty, and their dedication to public use, an intent to sever submerged lands from sovereignty "would not have been left for inference from ambiguous language." *Martin*, 41 U.S. at 416.

In the case of the Coeur d'Alene Indian Reservation, there is no evidence that Congress exercised its municipal sovereignty over the Territory of Idaho to sever the submerged lands of Coeur d'Alene Lake and the St. Joe River from sovereignty and convey them to the Coeur d'Alene Tribe for its proprietary use. Nor is there any reason to conclude that Congress severed the submerged lands from state sovereignty and dedicated them to the exclusive use of the federal government.

Up to the point of Idaho's admission, Congress passed three acts specifically addressing property rights within the Coeur d'Alene Reservation. The first was the Act of May 15, 1886, 24 Stat. at 44, which authorized negotiations with the Coeur d'Alene Tribe for the purchase of its lands outside the limits of the 1873 Executive Order Reservation. The second was the Act of May 30, 1888, 25 Stat. 160, which authorized a railroad right-of-way across the 1873 Reservation. The third was the Act of March 2, 1889, 25 Stat. at 1002, which authorized the purchase of certain lands within the 1873 Reservation. The 1889 Act was the last action Congress took with

respect to the Coeur d'Alene Reservation before passage of the Idaho Statehood Act, which accepted the terms of Idaho's constitution and admitted Idaho to the Union. Act of July 3, 1890, 26 Stat. 215. It is informative to review each of the above Acts in turn, comparing each to the congressional acts reviewed in this Court's submerged lands decisions.

The Act of May 15, 1886.

Little need be said about the 1886 Act, since neither the district court nor the court of appeals interpreted the 1886 Act as defeating state sovereign title to submerged lands. Indeed, the 1886 Act did nothing but authorize negotiations "with the Coeur d'Alene Indians for the cession of their lands outside the limits of the present Coeur d'Alene Reservation to the United States. . . . " Act of May 15, 1886, 24 Stat. at 44; App. 50. Nothing on the face of the Act implies an intent to defeat, or even address, state sovereign title to submerged lands within the reservation. Additionally, Congress made plain its intent that the 1886 Act was not to be construed as taking any final action with regard to the Tribe's lands, by providing that "no agreement made shall take effect until ratified by Congress." App. 50.

The Act of May 30, 1888.

Likewise, little need be said about the 1888 Act, which granted an "extension of [a] railroad through the lands in Idaho Territory set apart for the use of the Coeur d'Alene Indians by executive order, commonly known as the Coeur d'Alene Indian Reservation. . . . " Act of May 30, 1888, 25 Stat. 160; App. 137. The court of appeals did not specifically identify the 1888 Act as defeating state title to submerged lands, holding only that Congress' passage of the Act "supports congressional recognition of

the 1873 reservation, which Congress by this point knew included submerged lands." Pet. App. 21 n.13. Beyond recognizing the existence of the 1873 reservation, however, the 1888 Act does not purport to defeat state title to submerged lands, or otherwise convey or reserve such lands. The Act does mention Coeur d'Alene Lake and the St. Joe River, but only as geographic points describing the location of the railroad right-of-way, which crossed the Lake.

The Act of March 2, 1889.

The congressional action that received the primary attention of the court of appeals was the 1889 Act, which authorized negotiations for a cession of a portion of the 1873 Reservation. The court paid particular attention to the Act's legislative history. The history of the 1889 Act started with Congress' consideration of the 1887 agreement, which would have confirmed the 1873 boundaries. Pet. App. 21. As part of its consideration of the 1887 agreement, Congress attempted to ascertain, through an inquiry to the Department of Interior, whether the Coeur d'Alene Reservation included submerged lands. *Supra* at 10-12; App. 116. In response, the Department of Interior submitted a report to Congress stating that the Coeur d'Alene Reservation "appears to embrace all the navigable waters of Lake Coeur d'Alene," with the exception of a small fragment at the extreme north end of the Lake. App. 123. The court of appeals held that the report put Congress on notice that the executive branch construed the 1873 Reservation to include submerged lands. Pet. App. 21.

The court of appeals attached significance to the fact that "[a]lthough Congress had the opportunity and the power to repudiate the executive reservation and the

1887 agreement, it did not do so." Pet. App. 15. Instead, Congress authorized cession negotiations for the "purchase and release by said tribe of such portions of its reservation . . . as such tribe shall consent to sell." Act of March 2, 1889, 25 Stat. at 1002, App. 144. The court of appeals held:

> The express reference to the reservation as *the Tribe's reservation*, explicit recognition that the choice to sell was the Tribe's, and reference to *tribal release* of portions of *its reservation* all manifest an awareness and acceptance by Congress of the boundaries of the 1873 reservation – boundaries that included submerged lands.
>
> . . . .
>
> Although Congress may have been unhappy to learn that the executive reservation included submerged lands, its actions show recognition and acceptance of the passage of beneficial ownership to the Tribe, for it sought to *regain* as much submerged land as possible. The affirmative course of action on which Congress embarked in 1889 – open-ended negotiations to purchase whatever non-agricultural land, particularly submerged lands, the Tribe was willing to cede – presupposes that beneficial ownership of all land within the 1873 reservation, including submerged lands, had already passed to the Tribe.

Pet. App. 22-23 (emphasis in original).

1. The court of appeals, by holding that Congress did not "repudiate" the 1873 Executive Order Reservation, simply mischaracterized Congress' actions. Congress not only repudiated the 1873 Reservation, but such repudiation was the underlying purpose of the 1889 Act. The very reason that Congress required renewed negotiations

was Congress' refusal to accept the Reservation boundaries established in the 1873 Executive Order and the 1887 agreement.

The court of appeals was correct in one respect: Congress had the authority to repeal the 1873 Executive Order if it chose to do so. Executive orders do not vest the occupant tribe with compensable title, but only a right of permissive occupancy akin to a tenancy at will. *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 176 (1947). It is not surprising, however, that Congress chose not to repeal the 1873 Executive Order. An outright repeal of the Order would have left the Tribe's farmlands unprotected. A repeal also would not have resolved outstanding claims of aboriginal title within the boundaries of the Reservation. As the Commissioner of Indian Affairs noted in his 1888 Report, it was the Indian Department's position that "these Indians have all the original Indian rights in the soil they occupy" and that such rights predated the 1873 Executive Order. App. 131.

Given the above concerns, Congress chose to repudiate the 1873 Reservation, and its inclusion of submerged lands, by refusing to accept the existing Reservation boundaries, and directing further negotiations that would result in a radical diminishment of the Reservation. Congress' action can be characterized as an "acceptance" of the 1873 Reservation only through the most twisted application of logic.

2. The holding of the court of appeals cannot be reconciled with this Court's submerged lands decisions. As discussed above, this Court has inferred an intent to defeat state title to submerged lands only where Congress, by a definite declaration or plain statement of

intent, severs submerged lands from future state sovereignty and dedicates them to specific federal or tribal uses. The 1889 Act simply has no comparison to the strong language that led to defeats of state title in *Choctaw Nation* and *Alaska*. Unlike *Choctaw Nation*, there is no language promising that Reservation lands would never be part of a future state, or otherwise severing submerged lands within the Coeur d'Alene Reservation from future state sovereignty. The 1889 Act was a repudiation of the 1873 boundaries, and an authorization to negotiate new boundaries; nothing more. There is no basis for concluding that Congress intended to defeat future state sovereignty over submerged lands. Indeed, there is no indication on the face of the Act, or in its legislative history, to indicate that Congress gave any thought to the effect its actions may have on future state sovereign title to submerged lands.

The 1889 Act is also distinguished from the provisions reviewed in *Alaska*. In both of the provisions reviewed in *Alaska*, Congress plainly stated its intent to prevent the assumption of state sovereignty over the reservations at issue. *See Alaska*, 521 U.S at 41 (discussing assertion of exclusive Enclave Clause jurisdiction over petroleum reserve); Pub. L. 85-508, 72 Stat. at 340-41 (discussing state assumption of sovereignty over fish and wildlife management and ownership of associated properties). Nothing in the 1889 Act compares to the language reviewed in *Alaska*. No provision in the Act limits the future assumption of state sovereignty over the Coeur d'Alene Reservation. As such, the operative language is analogous to that reviewed in *Utah Div. of State Lands*, since it did not "purport to defeat the entitlement of

future States to any land reserved," and made "no mention of the States' entitlement to the beds of navigable rivers and lakes upon entry into statehood." 482 U.S. at 208. In short, the 1889 Act lacks any indication that Congress intended to address the issue of whether submerged lands within the Reservation would be subject to future state sovereignty. In the absence of such evidence, it cannot be reliably concluded that Congress intended to defeat state sovereign title to submerged lands.

3. The court of appeals also failed to appreciate the significance of the fact that the 1889 Act lacked any express reference to submerged lands. The operative language of the Act merely directed the Secretary of Interior to "negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell. . . . " 25 Stat. at 1002; App. 144. The lack of an express reference to submerged lands is especially revealing. As the court of appeals noted, the Act was prompted by Congress' displeasure upon learning that the Department of Interior interpreted the Reservation to embrace submerged lands. Pet. App. 23. Yet, in the 1889 Act, Congress failed to list submerged lands among the lands to be purchased.

The omission of any mention of submerged lands in the 1889 Act could not be anything other than purposeful. The most natural reading of the omission is that Congress understood that the submerged lands were part of the regalia of sovereignty, and not subject to tribal ownership or disposal. Rather, Congress limited its express recognition of tribal property rights to the uplands adjacent to the Lake. Such a limitation reflects the understanding

that the lake was a public highway whose use was limited by tribal ownership of the adjacent uplands, which were necessary to construct the landings and shore facilities needed to make the Lake useful as a highway of commerce.[15]

The fact that the language in the 1889 Act applied only to uplands is analogous to the situation addressed in *Utah Div. of State Lands*. There, the Court held that the language of withdrawal was necessarily limited to uplands otherwise open to settlement. 482 U.S. at 203. The intent to limit the withdrawal to uplands was only affirmed by the fact that the federal purpose of developing Utah Lake as a reservoir was fully met by the reservation of title to adjacent uplands, and did not require defeat of public title to the lakebed. 482 U.S. at 206-08. Here, Congress' purpose of securing public use of the Lake did not require recognizing tribal title to the lakebed, since its purpose was fully met by acquiring tribal title to adjacent uplands. Indeed, it would have been incongruous for Congress to affirmatively defeat public title to the Lake for the sole purpose of purchasing it back from the Tribe. Congress therefore declined to expressly recognize tribal title to the lakebed.

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[15] Congress' refusal to recognize tribal title to submerged lands was consistent with the fact that at this point in history, the prevailing law was this Court's decision in *Pollard v. Hagan*, which held that Congress could not defeat state title to submerged lands. *Pollard*, 44 U.S. (3 How.) at 28-29. It was not until the 1894 decision in *Shively v. Bowlby* that the Court confirmed the power of Congress to defeat future state title to submerged lands during the period of territorial government. 152 U.S. at 48.

Similar omissions of express references to submerged lands have figured prominently in this Court's past decisions. *See Montana*, 450 U.S. at 554 ("[t]he treaty in no way expressly referred to the riverbed"); *Utah Div. of State Lands*, 482 U.S. at 203 ("[t]he words of the 1888 Act did not necessarily refer to lands under navigable waters"). In short, an express reference to lands under navigable waters is crucial to the determination that Congress definitely declared or otherwise made plain its intent to defeat state title to the submerged lands. This rule is of especial application to the 1889 Act, where the executive branch had construed the Reservation boundaries to embrace submerged lands, and Congress' response was to order the purchase of certain uplands and the negotiation of new boundaries. If Congress had intended to recognize and affirm tribal title to the lakebed, it would have naturally included the Lake in the description of the lands to be acquired.

4. It is beyond question that the 1889 Act did not convey any lands to the Coeur d'Alene Tribe. At most, Congress recognized the Tribe's pre-existing rights of exclusive use and occupancy, and directed the purchase of those rights. *See Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 176 (1947) (holding that Indian reservations set aside by executive orders vest the occupant tribes with rights of permissive occupancy). In fact, this conclusion is implicit in the court of appeals' holding that Congress was directing the purchase of lands that "had already passed to the Tribe." Pet. App. 23.

Congress' recognition that the Tribe held an exclusive right of occupancy to lands within the Reservation, however, does not imply that Congress intended to sever submerged lands within the Reservation from future state

sovereignty. In this Court's decisions addressing title to submerged lands within Indian reservations, a defeat of state title has been inferred only where Congress explicitly granted or conveyed the submerged lands to the occupant Tribe in fee. *Choctaw*, 397 U.S. at 635. Where the Act in question granted or recognized tribal rights of exclusive use or occupancy, no defeat of state title has been found.

For example, in *Holt State Bank*, the Court was asked to determine title to the submerged lands underlying Mud Lake on the Red Lake Indian Reservation. 270 U.S. at 52. The Court deemed it significant that lands within the Reservation had never been formally granted to the Tribe, nor had the rights of the Indians been affirmatively declared. *Id.* at 58. Rather, what had been done was to "reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory. . . . " *Id.* The Court held that this recognition of the aboriginal right of occupancy was insufficient to deny the State sovereign title to the submerged lands of Mud Lake, since there was nothing in the recognition that "even approaches a grant of rights in lands underlying navigable waters. . . . " *Id.* at 58-59.

In *Montana*, there was a ratified treaty setting apart lands for the exclusive use of the Tribe, but the Court analogized the Tribe's rights in reservation lands to those recognized in *Holt State Bank*: "[A]s in *Holt*, '[t]he effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory.' " 450 U.S. at 554, *quoting Holt State Bank*, 270 U.S. at 58. Again, the right of occupancy, even though permanent and exclusive, was held insufficient to defeat sovereign title to submerged lands, since it

did not amount to a conveyance of the riverbed in clear and especial words. *Id.*

Together, *Holt State Bank* and *Montana* establish that the United States' recognition of a tribal right of exclusive use and occupancy does not imply an intent to defeat the future assumption of state sovereignty over submerged lands. There must be more. In the 1889 Act, however, there was nothing more. Congress conveyed no property rights to the Tribe; it simply authorized the purchase of the Tribe's existing rights of occupancy. Indeed, Congress took care to assure that its action would not be construed as granting the Tribe any recognizable rights until it had an opportunity to review and approve the results of the negotiations it authorized. *See* Act of May 15, 1886, 24 Stat. at 44 ("no agreement made shall take effect until ratified by Congress"); Act of March 2, 1889, 25 Stat. at 1002 ("which purchase shall not be complete until ratified by Congress"). App. 51, 144.

In short, the 1889 Act, at most, recognized existing tribal rights of occupancy within the Reservation, and then only until the completion of negotiations to purchase the timber and mineral lands. As in *Holt State Bank* and *Montana*, this recognition of the Tribe's continued occupation of what remained of their aboriginal territory did not amount to a grant or conveyance sufficient to infer an intent to defeat state title to submerged lands within the Reservation.

5. Because the 1889 Act contains no plain statement of intent to defeat state title to submerged lands, no further inquiry is needed. But, if the Court were to look beyond the plain language of the Act, as did the court of appeals, the purpose of the Reservation would be a critical factor

in determining whether a defeat of state title is implied by the terms of the Act. *See Alaska*, 521 U.S. at 52 (noting that in prior submerged lands decisions, the Court "focused on the purpose of the conveyance or reservation as a critical factor in determining congressional intent"). Defeats of state title to submerged lands within federal reservations have been found only where the assumption of state title would have thwarted the purpose of the reservation.

For example, in *Choctaw Nation*, state title to submerged lands could not be reconciled with the stated purpose of the Treaty of Dancing Rabbit Creek, which was to guarantee the Nation exclusive sovereignty over its lands, and forbid the inclusion of those lands in any future state. *Choctaw Nation*, 397 U.S. at 625. In *Alaska*, state ownership would have thwarted the government objectives of retaining exclusive federal sovereignty over petroleum reserves and aquatic wildlife habitat. 521 U.S. at 43 ("[t]he transfer of submerged lands at statehood – and the loss of ownership rights to the oil deposits beneath those lands – would have thwarted that purpose [of securing a supply of oil and gas"]); *id.* at 52 ("waters within the boundaries of the Range were an essential part of the habitats of the species the Range was designed to protect, and . . . retention of lands underlying those waters was critical to the Government's goal of preserving these aquatic habitats").

In the case of the Coeur d'Alene Indian Reservation, neither of the lower courts bothered to determine the purposes of the Reservation as understood by Congress, nor did they explain how the purposes of the Reservation would be thwarted by state ownership of submerged lands. The court of appeals determined there was no need

"that Congress apprehend the purpose of the reservation at the time it takes action recognizing the executive reservation." Pet. App. 18 n.11. Thus, the court limited its discussion of purpose to the finding that when establishing the reservation by executive order, "the government's negotiators and agents were aware of the Tribe's dependence on fishing in 1873." Pet. App. 19.

The court of appeals' failure to explore the purposes of the Reservation, as understood by Congress, is indefensible. The 1889 Act was not an affirmation of the 1873 Executive Order Reservation or its purposes; it was a mandate to radically alter the Reservation to meet the changing needs of the Tribe. As such, examination of the purposes of the altered Reservation is required to fully understand congressional intent.

The purposes of the altered Reservation are easily discerned on the face of the 1889 Act. Although the language is directed toward the purchase of certain lands, Congress' objectives for the continuing Reservation are also evident. Congress directed the Secretary of Interior to negotiate with the Tribe for the purchase and release of "such portions of its reservation not agricultural and valuable chiefly for minerals and timber. . . . " 25 Stat. at 1002; App. 144. The express language of the Act directs the Secretary of Interior to protect the Tribe's agricultural lands, reflecting the fact that the primary purpose of the continuing Reservation was to protect the Tribe's agricultural activities.

The fact that Congress' primary purpose for the new Reservation was to protect the Tribe's agricultural land is supported by the legislative history. The reports submitted to Congress in relation to the 1887 agreement uniformly portrayed the Coeur d'Alene Indians as farmers.

The commission that negotiated the 1887 agreement reported that "[t]he reservation is one of the best we have visited . . . [t]he Indians have good productive farms, good houses, barns, gardens, horses, hogs, cattle, domestic fowls, wagons, agricultural implements of the latest patterns, and indeed everything found on flourishing farms." S. Ex. Doc. No. 14, 51st Cong., 1st Sess. 50 (1889); App. 217.

In 1888, the Commissioner of Indian Affairs, in responding to the Senate's inquiry regarding Coeur d'Alene Lake, affirmed the Tribe's reliance on agriculture, and added that "[t]here are few Indians in the entire country, if we except the five civilized tribes, who are as far advanced. . . . " S. Ex. Doc. No. 76, 50th Cong., 1st Sess. 5 (1888); App. 126. Given this legislative history, and the express language in the 1889 Act, Congress clearly anticipated that after the diminishment of the Coeur d'Alene Reservation, the primary purpose of the Reservation would be to provide the lands necessary to sustain the Tribe's agricultural efforts.

Even assuming, for purposes of argument, that the purpose of the reduced Reservation was to provide fishing opportunities for the Coeur d'Alene Tribe, such a purpose is not necessarily incompatible with state sovereignty over submerged lands. Federal protection of tribal fishing rights does not imply the exclusion of state sovereignty over natural resources. Indian hunting and fishing rights "can coexist with state management of natural resources." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999). The Court has "repeatedly reaffirmed state authority to impose reasonable and

necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation." *Id.* at 205. State authority over hunting and fishing by tribal members extends to lands within the boundaries of Indian reservations. *Puyallup Tribe, Inc. v. Washington Dept. of Game,* 433 U.S. 165, 175-77 (1977).

The recognition that States may regulate treaty hunting and fishing when necessary for conservation "accommodates both the State's interest in management of its natural resources and the [tribe's] federally guaranteed treaty rights." *Minnesota,* 526 U.S. at 205. By employing such a standard, "treaty rights are reconcilable with state sovereignty over natural resources." *Id.* Thus, state sovereignty over submerged lands and federal protection for tribal fisheries are not irreconcilable, distinguishing this case from *Alaska,* where state ownership of submerged lands would have thwarted the primary purposes of the reservations.

The Act of July 3, 1890.

The final action Congress took with regard to Indian reservations within the Idaho Territory was the Act admitting Idaho to the Union. Act of July 3, 1890, 26 Stat. 215. Although there was no specific mention of the Coeur d'Alene Reservation, the Act affirms the following provision in the Idaho Constitution:

> And the people of the state of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian

> lands shall remain under the absolute jurisdiction and control of the congress of the United States. . . .

Idaho Const., Art. 21, § 19.

The court of appeals did not read this provision as a defeat of state title to the submerged lands at dispute here, but it did cite the provision as "weigh[ing] in favor of the conclusion we have reached, for it disclaims title to land 'held by' Indians." Pet. App. 24.

The court of appeals' conclusion, however, presupposes that Congress had, prior to statehood, affirmatively acted to defeat state title to submerged lands. On its own, the provision cannot be read as a defeat of state title to submerged lands within the boundaries of the Coeur d'Alene Indian Reservation. As this Court has repeatedly recognized, during the territorial period, submerged lands within the boundaries of Indian reservations are held in trust for future States, unless Congress takes affirmative action to defeat state title to the submerged lands prior to the State's admission. *Montana*, 450 U.S. at 551.

The language of Article 21, Section 19 of the Idaho Constitution merely disclaims title to lands owned or held by Indian tribes. It does not alter tribal title or convey any interests not already held. Thus, in the absence of a pre-statehood act that defeated state title to submerged lands within the Coeur d'Alene Indian Reservation, those lands, at the point of statehood, continued to be held by the United States in trust for the State of Idaho, and were not "held by any Indians or Indian tribes." Given that fundamental fact, the disclaimer provision in the Idaho Constitution does not affect the issues before the Court.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted.

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